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Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-489

CLARK COUNTY, a political subdivision of the State of Nevada,
Petitioner,

vs.

MARGARET TURNER, as Legal Guardian of LIONEL EUGENE HOLLINS, YOLANDA K. HOLLINS and MARVAR ADAMS,
Respondent.

PETITIONER'S REPLY MEMORANDUM

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The Respondent, in her opposing brief, makes numerous assertions of fact which are unsupported in the record, immaterial and, perhaps, erroneous. However, since the present posture of this case involves only the question of the jurisdiction of this Court, the same will be disregarded herein, and this Memorandum will address itself only to Respondent's contentions against such jurisdiction.

I

As the record indicates (Petition, A 23), the decision below reversed the dismissal of the complaint against Petitioner and remanded the cause for further proceedings. Respondent contends that such an order is not final and therefore not reviewable by the United States Supreme Court under 28 U.S.C. §1257 (Brief in Opp., p. 5).

Petitioner submits that such a contention is erroneous and entirely ignores recent decisions of the United States Supreme Court which interpret "finality" for the purpose of determining ripeness for review. In a line of cases commencing with *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), the Court has recognized the finality of an order and its ripeness for review *notwithstanding* the fact that further proceedings were ordered by the court below. *Rosenblatt* v. *American Cyanamid Company*, 86 S. Ct. 1 (1965); *Hudson Distributors, Inc.* v. *Eli Lilly & Co.*, 377 U.S. 386 (1964); *Mercantile National Bank of Dallas* v. *Langdeau*, 371 U.S. 555 (1963) and *Local No. 438 Construction & Gen. Lab. U.* v. *Curry*, 371 U.S. 542 (1963).

Enunciating the "collateral order doctrine" as it applies to 28 U.S.C. §1291, regarding appeals from final decisions of district courts, this Court in *Cohen* v. *Beneficial Industrial Loan Corp.*, supra, at 546 stated:

> "This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the actions, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. The Court has long given this provision of the statute this practical rather than a technical construction." [Citations omitted].

The concept of collaterality of an appeal based on the adjudication of certain rights which are separable from the other issues to be litigated later during a trial on the merits, was applied to the finality rule of 28 U.S.C. §1257 in *Local No. 438 Construction & Gen. Lab. U.* v. *Curry*, supra. The Court's opinion in *Curry* was enlarged and redefined in *Mercantile National Bank at Dallas* v. *Langdeau*, supra, to the effect that the venue determined in that case was final

as a "separate and independent matter, anterior to the merits, and not enmeshed in the factual and legal issues comprising the plaintiff's cause of action." Id., at 558.

Following the precedent of *Curry* and *Langdeau*, the Court in *Hudson Distributors, Inc.* v. *Eli Lilly & Co.*, supra, recognized the finality of a determination on the validity of a state statute in advance of an adjudication of other issues raised by the litigants on cross-petition. The Court in finding the decision below final and reviewable, despite "further proceedings" ordered in that decision, said:

> "The fact that separate and unresolved issues are pending in the Ohio courts and subject to 'further proceedings' therein on the cross-petition does not render the judgment of the Ohio Supreme Court on the issue here considered and decided non-final or unappealable within the meaning of 28 U.S.C. §1257." [Citations omitted]. Id., note 4 at 389.

In a case comparable to the one at bar, this Court held that an appeal from an order denying appellant's motion to dismiss (which challenged the constitutionality of a state statute) was "final" for purposes of review by the Court under 28 U.S.C. §1257. The Court, drawing upon the factors determining finality in *Curry* and *Langdeau* and comparing them to the instant case, stated:

> "Here, as in *Curry*, there has been: (1) a final assertion of jurisdiction, with no review of that issue possible in the state courts, (2) a threat of serious erosion of national policy (here, the due process right against subjection to excessive state assertions of *in personam* jurisdiction); and (3) a state judgment on an issue anterior to and separable from the merits, and not enmeshed in the factual controversies of the case." *Rosenblatt* v. *American Cyanamid Company*, 86 S. Ct. 1, 3.

Petitioner respectfully submits that the record of the case at bar clearly shows that the decision below, similar to that of *Rosenblatt*, is characteristic of those decisions deemed by this Court to be separable from, and collateral to, a determination on the merits.

Petitioner has no procedural recourse, other than review by the United States Supreme Court, to appeal the nullification by the Nevada Supreme Court of NRS 244.245 and NRS 244.250. As determined by the highest court of the State of Nevada, these statutes are constitutionally infirm and therefore void and of no effect. Such is now the law of the case and the doctrines of *res judicata* and *stare decisis* operate to forever bar the defense provided by NRS 244.245 and NRS 244.250 from being raised against Respondent's claim or any other claim brought against Petitioner in the State of Nevada. Thus, the issues to be determined in the "further proceedings" ordered by the decision below are independent of and collateral to the issue of the constitutionality of the Nevada claim statutes, that issue having been finally and unalterably determined by the highest court of the State.

II

Respondent contends that the decision below rests on adequate non-federal grounds and is therefore non-reviewable by the United States Supreme Court. (Brief in Opp., p. 6).

Petitioner submits that Respondent's brief in support of this contention, through the use of truncated and immaterial quotations, takes such liberties with the decision below that it distorts, if not obscures, the obvious grounds upon which that decision was based.

Respondent fails to cite, nor does the decision contain, any adequate state constitutional grounds upon which the

Nevada claim statutes could have been voided, save the court's mention of Article 8, §5 of the Nevada Constitution in the following:

> "Contrary to the mandate of Art. 8, §5 of the Nevada Constitution and the intention of the legislature to place victims of negligent conduct on equal footing (NRS 41.031), failure to give the 6 month statutory notice arbitrarily bars the victims of governmental tort while the victims of private tort suffer no such bar." (Brief in Opp., p. 6).

Respondent neglects, however, to bring to the attention of this Court the qualifying language immediately following that paragraph, which states:

> "Such arbitrary treatment clearly violates the equal protection guarantees of the United States Constitution. See Art. 1, §2, Nevada Constitution." (Petition, A 23).

Clearly, the above sentence characterizes the statutory notice requirement of NRS 244.245 as repugnant to the equal protection clause of the Fourteenth Amendment of the United States Constitution and necessarily qualifies the preceding non-federal references accordingly.

At page 6 of the Brief in Opposition, Respondent cites the following portion of the decision below in support of the allegation that adequate non-federal grounds exist for the court's decision.

> "Within our present scheme of government, claim statutes serve no real beneficial use (Grubaugh v. City of St. Johns, supra) but they are indeed a trap for the unwary. NRS 41.038(1). If we follow Barney, the minor's cause of action will be barred. They will be precluded from enforcing a liability created by statute for their benefit."

Again, however, Respondent omits the sentence immediately following, in the same paragraph, which states:

> "Such construction of NRS 244.245 creates invidious discrimination and amounts to a denial of due process and equal protection of the law." (Petition, A 21).

Obviously, this portion omitted by Respondent indicates that the court's refusal to enforce the claim statutes, was based on its determination that such enforcement would deny to the Respondent the guarantees of due process and equal protection of the law mandated by the United States Constitution. Indeed, the deletion of this significant expression in the decision below reveals Respondent's self-serving attempt to obscure the federal grounds of the decision.

Further evidence that the determination below rested firmly upon federal grounds is found in the earlier order of the Nevada Supreme Court to remand this case to the trial court so that the issue of federal constitutionality of the claim statutes could there be determined and properly raised before the Nevada Supreme Court on appeal. This is stated in the decision below as follows:

> "The question of constitutionality of the claim statute was not properly raised before this court, and had not been ruled upon below. After the question was urged in oral argument we remanded the case to the trial court for a decision on that issue. The briefs filed on remand did not convince the lower court that Barney v. County of Clark, supra, need be reviewed as to that point. We deem otherwise." (Petition, note 6 at A 21).

Petitioner submits that such a statement clearly indicates the intention of the Supreme Court of Nevada to specifically determine the constitutionality of the claim statutes in the decision below with reference to the United States Constitution.

Finally and conclusively, the decision below expressly declares the equal protection clause of the Fourteenth Amendment of the United States Constitution to be the authority upon which the decision is based and the grounds upon which Nevada's claim statutes, NRS 244.245 and NRS 244.250, were nullified.

> "We *could* conclude that minority alone will excuse compliance with the notice requirements of NRS 244.245 and NRS 244.250 (City of Houston v. Bergstrom, 468 S.W.2d 588 (Tex.Civ.App. 1971); McCrary v. City of Odessa, supra; Grubaugh v. City of St. Johns, 180 N.W.2d 778 (Mich. 1970)) and dispose of this case upon the ground that the notice requirements of our claim statutes violate the rights of these minors to due process guaranteed by the Fourteenth Amendment of the United States Constitution. *However, we believe that the notice of claim requirements found in NRS 224.245 and NRS 244.250 as applied to governmental torts deny equal protection guaranteed by the United States Constitution.*" (Emphasis added) (Petition, A 21).

CONCLUSION

In light of the authority cited and arguments tendered hereinabove, Petitioner submits that Respondent's Brief in Opposition is plainly without merit. Respondent has ignored relevant decisions of the United States Supreme Court which have determined that opinions such as the one below, are final for purposes of review pursuant to 28 U.S.C. §1257. Further, Respondent's contention to the contrary notwithstanding, even a superficial reading of the decision below reveals that the court based its judgment exclusively upon federal constitutional grounds. Petitioner

therefore submits that the jurisdiction of the United States Supreme Court is clearly warranted in this action and prays that this Court grant a writ of certiorari to review the judgment and opinion of the Supreme Court of the State of Nevada.

Respectfully submitted,

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